LORINDA L. HULSMAN

IBLA 79-157 Decided March 31, 1980

Appeal from decision of the California State Office, Bureau of Land Management, rejecting appellant's Indian allotment application (CA 1756) in part.

Decision vacated and remanded.

1. Administrative Procedure: Hearings -- Indian Allotments on Public Domain: Generally

Where disputed issues of fact are raised by an Indian allotment applicant concerning whether (1) the applicant's occupancy qualifies her for an Indian allotment, (2) the applied for land taken together with other patented land would be enough to sustain a family of four through the grazing season, and (3) the public interest could best be served if the land were retained in Federal ownership, the applicant is entitled to notice and an opportunity for hearing before the application is rejected on the record.

APPEARANCES: Lorinda L. Hulsman, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Lorinda L. Hulsman has appealed from a decision of the California State Office, Bureau of Land Management (BLM), rejecting her Indian allotment application (CA 1756) in part. 1/

1/ The subject application was filed under the General Allotment Act, 25 U.S.C. § 334 (1970). Since national forest land is involved, the application was treated as one under 25 U.S.C. § 337 (1970), regarding allotments within national forests.

Appellant originally filed this application for an Indian allotment April 4, 1974, for 75 acres of land located within the Lassen National Forest, in sec. 22, and sec. 23., T. 27 N., R. 2 E., Mount Diablo meridian, California. 2/ Appellant stated in the application that she occupies the land and asserts that the area has been fenced for many years.

BLM approved the application as to the five acres in sec. 23, but rejected it as to the 70 acres within sec. 22 because the land had been patented and subsequently reconveyed to the United States in 1955 as part of a forest exchange. BLM made this determination apparently based on a conclusion drawn from a Forest Service report that appellant has never "occupied, lived on, or placed improvements on the land." Hulsman appealed that part of the decision rejecting the 70 acres, asserting that she had used this land for grazing purposes for many years together with other lands previously patented to her.

In considering this appeal, in Lorinda Hulsman, 32 IBLA 280, 283 (1972), we pointed out that the Secretary of Agriculture (or his delegate) is required by statute, 25 U.S.C. § 337 (1970), to determine whether the national forest lands applied for are more valuable for "agricultural or grazing purposes than for the timber found thereon," Curtis D. Peters, 13 IBLA 4, 5-7, 80 I.D. 595, 596 (1973), aff'd, Peters v. Morton, Civ. No. 75-0201 (N.D. Calif., November 5, 1975). As in the instant case, once a determination has been made by the Forest Service (as the delegate of the Secretary of Agriculture) that the land is more valuable for agriculture or grazing than the timber thereon, the adjudication of the application must then be carried out by BLM. However, from our initial review of the facts, we determined that the record was incomplete as to several crucial issues, i.e.:

> First, what is the nature of the occupancy or improvements required by statute, 25 U.S.C. § 337 (1970), as prerequisites of an Indian allotment in a national forest? Secondly, this application raises the question of whether the land embraced in an Indian allotment application has to comprise an economic unit in its own right or whether it may be considered together with contiguous land already allotted to the applicant. A third issue presented is

2/ This is the second application by the appellant for an allotment within the Lassen National Forest. Her prior application (S-4942) for 160 acres in sec. 22 and 23, T. 27 N., R. 2 E., Mount Diablo meridian, led to the granting of a trust patent to appellant for 85 acres and the rejection of the application for the remaining 75 acres. The land described in the present application is contiguous to the land previously patented to appellant, but was not involved in the prior application. That application also involved an appeal decided by this Board. Lorinda L. Hulsman, 13 IBLA 178 (1973).

> whether a sufficient basis has been established below for the determination that the land has public uses and that, hence, rejection of the Indian allotment application in the exercise of the Secretary's discretion is required in the public interest.

We, therefore, remanded the case to BLM for further examination specifically to determine (1) whether appellant's alleged occupancy is such as to qualify her for an allotment; (2) to reconsider the viability of the allotment, and (3) to allow an independent evaluation of the public interest by BLM.

BLM conducted a further independent field inspection of the applied for lands in order properly to consider these issues. From this inspection and from further evaluation, it has concluded that its initial disposition of the application was correct and again has rejected the application as to the 70 acres of land in sec. 22.

Appellant objects to this finding, asserting that she has not yet received her full entitlement to 160 acres. She contends that she is entitled to this particular land based on her stated improvements and the fact that her family had been on the land and had settled it for years prior to her occupancy. She disagrees with the grazing report and contends this land, taken with her other 90 acres, can become an economic unit.

[1] As we previously have indicated, the granting of an Indian allotment in a national forest, assuming that the statutory criteria have been met, is committed by statute to the discretion of the Secretary of the Interior and is not a mere ministerial duty. 25 U.S.C. § 337 (1970); Curtis D. Peters, supra. The exercise of that discretionary authority must be predicated upon rational grounds. Curtis D. Peters, supra; cf. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972). The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976), was similarly couched in discretionary terms. Nevertheless, the Ninth Circuit in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and in Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), concluded that an applicant was entitled to notice and opportunity for hearing where the resolution of the case depends upon the determination of disputed issues of fact. Appellant has raised the same type of disputed issue of fact in this case. Similarly, we find no valid line of demarcation between granting Alaska Natives a right to a hearing in such circumstances and denying the opportunity for such a hearing to an Indian in the contiguous public land states. Therefore, we find that appellant is entitled to notice and an opportunity for a fact-finding hearing before the application is rejected on the record.

Accordingly, pursuant to the authority delegated to the Board of Land appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded to the Hearings Division for further action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I heartily concur in the conclusion of the main opinion that a hearing is appropriate.

Despite the fact that the Act of June 25, 1910, 25 U.S.C. § 337 (1976), recites that the "Secretary of the Interior is authorized in his discretion, to make allotments within the national forests * * * to any Indian occupying, living on, or having improvements on land included within any such national forest," the Department rarely has exercised that discretion adverse to Indian claimants thereunder. See Curtis D. Peters, 13 IBLA 4, 80 I.D. 595 (1973), aff'd, Peters v. Morton, Cir. No. 75-0201 (IX. D. Calif., November 5, 1975) and Benjamin F. Sanderson, Sr., 16 IBLA 229 (1974). Peters' rationale was that the land applied for did not constitute an economic unit.

The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976), was similarly couched in discretionary terms. Nevertheless, the Ninth Circuit in its infinite wisdom, concluded in Pence v. Kleppe 529 F.2d 135 (9th Cir. 1976), and in Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), that an applicant was entitled to notice and opportunity for hearing where the resolution of the case depends upon the determination of disputed issues of fact.

The main opinion turns on resolution of the following fact issues:

1. Appellant's compliance with statutory requirements as to settlement or improvements.

2. The economic viability vel non of appellant's fee land together with the land applied for.

3. The so-called "public interest" factors, which the prior opinion states are antithetical to disposal of the land.

Appellant disputes all these factual findings.

I can find no rational legal distinction between granting Alaska Natives a right to a hearing in such circumstances and denying the opportunity for such a hearing to an Indian in the contiguous public land states. Both laws are designed to afford Indians (and others in Alaska) an opportunity to acquire land for subsistence.

Moreover, Stickelman v. United States, 563 F.2d 413 (9th Cir. 1977), although arising in a desert land extension context, reinforces

my belief that appellant must be afforded an opportunity for a hearing before adverse action is taken on her application.

The main opinion recognizes the need for due process.

Frederick Fishman
Administrative Judge